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ATTORNEYS FOR DEFENDANT
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CONSULTANTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK C. BOON,	)	Federal Civil
	)	Case Number: 12CV3081-H-WMC
Plaintiff,)	
	)	DEFENDANT'S REPLY TO
	)	PLAINTIFF'S OPPOSITION TO
	)	DEFENDANT'S MOTION FOR
	)	A FINDING OF BAD FAITH AND
-vs-	)	HARASSMENT AND AN AWARD
	)	OF ATTORNEY'S FEES UNDER
PROFESSIONAL COLLECTION	)	15 U.S.C. 1692k(a)(3)
CONSULTANTS,	)	AND RULE 11
)	
	)	Date: April 14, 2014
	)	Time: 10:30 A.M.
Defendant.	)	Courtroom: 15A (Annex)
	)	JUDGE MARILYN HUFF
	)	(ORAL ARGUMENT REQUESTED)

I. INTRODUCTION

Since Plaintiff failed to file any oppositon to the amount of attorney fees claimed by Defendant (\$31,830.00), Plaintiff has conceded that Defendants attorney fee request is reasonable for the work performed, and that all the work performed by Defendant was reasonable and necessary.

1 Plaintiff opposes fees **solely** because of Defendant's
2 alleged failure to comply with Rule 11 and Defendant's
3 failure to establish eligibility for attorney fees under
4 15 U.S.C. Section 1692k(a)(3).

5 Defendant's Motion to Dismiss the Third Amended
6 Complaint contained a request for a finding of bad faith
7 and intent to harass and an award of attorney fees. Judge
8 Huff declined to consider this request, stating in a
9 footnote to her Order granting Summary Judgment that:

10 "Defendant PCC also requests an order permitting it
11 to file a motion for an award of attorney's fees,
12 pursuant to 15 U.S.C. Section 1692k(a)(3). Unless
13 a statute or court order provides otherwise, a claim
14 for attorney's fees may only be filed after the
15 entry of judgment. Fed. R. Civ P. 54(d)(2)(B)."

16 Following entry of judgment in favor of Defendant on
17 all claims, Defendant filed this Motion for a Finding of
18 Bad Faith and Harassment and for Award of Attorney Fees
19 pursuant to 15 U.S.C. Section 1692k(a)(3), which provides
20 as follows:

21 "..."(3) in the case of any successful action to
22 enforce the foregoing liability, the costs of the
23 action, together with a reasonable attorney's fee as
24 determined by the court. On a finding by the court
25 that an action under this section was brought in bad
26 faith and for the purpose of harassment, the court
27 may award to the defendant attorney's fees
28 reasonable in relation to the work expended and
costs.

15 U.S.C. Section 1692k(a)(3)

Plaintiff, in bad faith and for the purpose of
harassment, restated his claims that "The State Court
Action Allegations," "The Delaware Three Year Statute
Applies," "The Delaware Statute was not Tolled," and "No

1 Federal Statute of Limitations Exists that Preempts
2 Delaware's" in his Third Amended Complaint. These claims
3 were rejected by Judge Huff in her Orders Granting Motion
4 to Dismiss the First Amended Complaint dated August 1,
5 2013 and October 17, 2013 because Judge Huff found that
6 Defendant had not violated any law. Therefore, these
7 allegations should not have been included in Plaintiff's
8 Third Amended Complaint under the "Law of the Case
9 Doctrine." The inclusion of these claims in the Third
10 Amended Complaint constitutes bad faith and harassment
11 by Plaintiff.

12 In addition, Plaintiff sought to camouflage these
13 allegations with new factual allegations that Plaintiff
14 knew, or should have known, were not true because
15 Plaintiff had absolutely no evidence whatsoever to even
16 suggest that they were true. These new factual
17 allegations were inserted by Plaintiff in bad faith and
18 for the purpose of harassment because Plaintiff thought
19 they would defeat a Motion to Dismiss and thereby enable
20 Plaintiff to extort a financial settlement from Defendant
21 to avoid the cost of extensive discovery. Since Plaintiff
22 knew Defendant did not violate the F.D.C.P.A., these
23 actions were taken in bad faith and for the purpose of
24 harassment. Plaintiff is therefore liable to Defendant
25 for its attorney fees under 15 U.S.C. 1692k(a)(3).

26 **II. DEFENDANT PREVAILED ON THE ENTIRE ACTION**

27 Plaintiff cites the case of *Horkey v J.V.D.B.*, 333
28 F.3d 769, 775 (7th Cir. 2003) to support Plaintiff's

1 argument that since Defendant does not seek a finding of
2 bad faith and harassment for the entire action, Defendant
3 did not prevail on the entire action and is therefore not
4 entitled to Attorney Fees under the statute. However, a
5 review of the *Horkey* opinion shows that Plaintiff has
6 mis-cited the case and that it does not support
7 Plaintiff's argument.

8 In the *Horkey* case, the consumer prevailed on its
9 Motion for Summary Judgment on three of four causes of
10 action. The Defendant, debt collector, prevailed on only
11 one cause of action. Then, the Defendant Debt Collector
12 sought attorney fees based on the one cause of action on
13 which it prevailed. The Court denied the Debt Collector
14 request for attorney fees because:

15 An "action" "in its usual legal sense means a
16 lawsuit brought in a court." Black's Law Dictionary
17 28 (6th ed.1990). Thus, J.V.D.B. must show that
18 Horkey's entire lawsuit, and not just her claim
19 under 1692c(b), was brought in bad faith and to
20 harass J.V.D.B. Although we have not had occasion to
21 delineate what constitutes a lawsuit brought in bad
22 faith and for the purpose of harassment under §
23 1692k(a)(3), we are confident that no sound concept
24 of such a suit could encompass an action in which
25 the plaintiff wins summary judgment on three of her
26 four asserted claims and has a colorable argument as
27 to the claim on which she ultimately did not
28 prevail. The district court was, accordingly,
correct to deny J.V.D.B.'s motion for attorney's
fees under § 1692k(a)(3). We cannot fathom how it
could have done otherwise. In fact, at this juncture
any bad-faith accusations would more appropriately
be directed at J.V.B.D. for appealing the denial of
its attorney's fees, but that issue is not before
us.

Horkey v. J.V.D.B. & Associates, Inc., 333 F.3d 769,
775 (7th Cir. 2003)

1 Defendant PCC not only prevailed on the Summary
2 Judgment as to the entire Third Amended Complaint but
3 also prevailed on its Motion to Dismiss the Original
4 (which Plaintiff voluntarily amended prior to hearing);
5 the First Amended Complaint; and the Second Amended
6 Complaint.

7 While Defendant concedes that the Original, First
8 Amended Complaint, and Second Amended Complaint were not
9 filed in bad faith and for the purpose of harassment
10 because there were facts and conflicting case law
11 supporting the theories of recovery stated in those
12 pleadings, this concession does not preclude Defendant
13 from seeking a finding of bad faith, harassment, and
14 attorney fees for the filing of the Third Amended
15 Complaint which Defendant asserts **was** filed in bad faith
16 and for the purpose of harassment.

17 When this Court decided that the case law supporting
18 the theories of recovery stated in those pleadings were
19 wrong, Plaintiffs appropriate response would have been
20 to have filed an appeal to the Ninth Circuit.

21 Instead, Plaintiff filed the Third Amended Complaint
22 in bad faith and for the purpose of harassment. It is
23 this act, and this act alone, for which Defendant seeks
24 a finding of bad faith and harassment and its attorney
25 fees. The *Horkey* case has no application to the facts now
26 before this Court.

1 **III. BOON'S THIRD AMENDED COMPLAINT WAS FILED IN**
 2 **BAD FAITH AND WITH PURPOSE TO HARASS PCC**

3 Plaintiff argues that the Court must make actual
 4 findings of fact that the claims advanced were without
 5 merit and made in "bad faith" and for the purpose of
 6 "harassment". The following quotes from Order of Judge
 7 Huff dated January 30, 2014 establish that the Third
 8 Amended Complaint was filed in bad faith and for the
 9 purpose of harassment:

10 (1) "Boon opposes the motion for summary judgment,
 11 but puts forward **no affirmative evidence** to
 12 demonstrate a genuine issue of material fact." (Order Granting Defendant's Motion for summary Judgment at P. 4, lines 23-25).

13 (2) "Boon responds with **conclusory allegation** that
 14 PCC's filing of the state court action constituted
 15 a violation of the FDCPA because PCC acted in bad
 16 faith and without documentation. But Boon has **failed**
 17 **to produce any evidence to show bad faith on the**
 18 **part of PCC in the state court action.**" (Order Granting Defendant's Motion for summary Judgment at P. 6, lines 5-8).

19 (3) "**Boon has submitted no evidence** to dispute that
 20 PCC initiated a suit based on common law causes of
 21 action in California state court against a
 22 California resident." (Order Granting Defendant's
 23 Motion for summary Judgment at P. 7, lines 20-22).

24 These findings by Judge Huff establish the necessary
 25 elements of bad faith and harassment needed to support
 26 an award of attorney fees under 15 U.S.C. Section
 27 1692k(a)(3).

28 **IV. ATTORNEY FEES MAY BE AWARDED TO AN FDCPA DEFENDANT**
WHEN A PLAINTIFF FILES A CASE WITH NO MERIT AT ALL

 Plaintiff cites the case of *Bonner v Redwood Mortg.*,
 C 10-00479 WHA, 2010 WL 2528962 (N.D. Cal. June 18, 2010)
 for the proposition that even when debt collector

1 established claim was without merit, an award of fees is
2 improper. However, the Plaintiff has incorrectly cited
3 this case for a proposition it does not support.

4 In the Bonner case, a district court case, (which
5 was reviewed by Westlaw, but not assigned editorial
6 enhancement), attorney fees were awarded under *California*
7 *Civil Code Section 1717*, but not under Rule 11 because
8 no Rule 11 attorney fees were requested by the prevailing
9 party. The Court held:

10 "...A prevailing defendant, however, may be awarded
11 its attorney's fees as sanctions under FRCP 11 if
12 the court finds that the allegations in the
13 complaint and other factual contentions did not have
14 or were not likely to have evidentiary support at
the inception of the lawsuit. Given that defendants
have not moved for FRCP 11 sanctions, this order
declines to impose them and proceeds without
consideration of FRCP 11."

15 *Bonner v. Redwood Mortgage Corp.*, C 10-00479 WHA,
16 2010 WL 2528962 (N.D. Cal. June 18, 2010)

17 This case does not support the argument that a Plaintiff
18 who files an action for violation of the FDCPA that has
19 no merit cannot be ordered to pay the Defendants attorney
20 fees.

21 The cases cited by Defendant in its Motion, together
22 with the findings of Judge Huff cited herein, support a
23 finding that the Third Amended Complaint was filed in bad
24 faith and for the purpose of harassment.

25 **V. DEFENDANT COMPLIED WITH PROVISIONS OF RULE 11**

26 Plaintiff claims that Defendant failed to follow the
27 safe-harbor provisions of Rule 11(c)(2)- "having sent no
28 motion to Boon permitting withdrawal of the purportedly

1 offending pleading." This is not true.

2 In response to Boon's Third Amended Complaint,
3 Defendant filed a lengthy Motion to Dismiss or in the
4 alternative for Summary Judgment. This Motion informed
5 Plaintiff that his lawsuit had no merit whatsoever. This
6 Motion sought a finding that the Third Amended Complaint
7 was filed bad faith and for the purpose of harassment.

8 Upon receipt of this motion, Plaintiff could have
9 withdrawn the "offending third amended complaint".
10 Instead, even after Plaintiff had actual knowledge that
11 his lawsuit had no merit, Plaintiff filed Opposition to
12 Defendant's Motion instead of withdrawing the pleading.

13 The primary basis for the request for attorney fees
14 is 15 U.S.C. Section 1692k(a)(3), which requires that the
15 Court find that Plaintiff filed the pleading in bad faith
16 and for the purpose of harassment. These findings also
17 establish a factual basis for sanctions under Rule 11.

18 If the Court finds that Defendant is eligible for
19 attorney fees under 15 U.S.C. Section 1692k(a)(3),
20 this finding also provides cause for the imposition of
21 sanctions under Rule 11. Since Plaintiff was afforded an
22 opportunity to withdraw the offending pleading, and chose
23 not to, Defendant believes this Court has jurisdiction
24 to award Rule 11 sanctions as well as attorney fees under
25 15 U.S.C. Section 1692k(a)(3).

26 VI. CONCLUSION

27 The Plaintiff's Third Amended Complaint was filed in
28 bad faith and with the intent to harass Defendant.

1 Therefore, the Court should award attorney fees to
2 Defendant's counsel and against Plaintiff in the sum of
3 \$31,830.00 under the provisions of 15 U.S.C. Section
4 1692k(a)(3).

5 In addition, the filing of the Third Amended
6 Complaint and the opposition to the Defendants Motion to
7 Dismiss/Motion for Summary Judgment was filed in
8 violation of Rule 11. Therefore, the Court should award
9 attorney fees to Defendant's counsel and against
10 Plaintiff's counsel in the sum of \$31,830.00 under the
11 provisions of 15 U.S.C. Section 1692k(a)(3).

12 If the Court makes an award under both 15 U.S.C.
13 Section 1692k(a)(3) and Rule 11, the order should be made
14 joint and several as to Plaintiff and Plaintiff's
15 Attorney to prevent the possibility of a double recovery
16 by Defendant.

17
18 Dated: April 3, 2014

19
20 LAW OFFICES OF CLARK GAREN

21 BY /s/ Greg Lawrence
22 GREG LAWRENCE
23 Attorney for Defendant
Professional Collection Consultants
Email: glawrence53@aol.com
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CERTIFICATE OF SERVICE

I certify that on April 3, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Southern District of California by using the CM/ECF system.

I further certify that all of the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Greg Lawrence
GREG LAWRENCE, SB 82243